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No. 92-784

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED SELLERS, JR.
Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

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STATE OF OKLAHOMA'S MOTION FOR, LEAVE TO INTERVENE PURSUANT TO 28 UNITED STATES CODE, SECTION 2403(b)

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STATE OF OKLAHOMA'S MOTION FOR LEAVE TO INTERVENE PURSUANT TO 28 UNITED STATES CODE SECTION 2403(b)

The Attorney General of the State of Oklahoma, on behalf of the State of Oklahoma, pursuant to the provisions of 28 U.S.C. § 2403(b), respectfully requests that this Court grant the State of Oklahoma leave to intervene in this case to oppose the Petition for Writ of

Certiorari and to be heard on the question of the constitutionality of an Oklahoma Constitutional provision and statute called into question in the Petition for Writ of Certiorari.

In support of this Motion, the State of Oklahoma would show the Court as follows:

1. The Petition for Writ of Certiorari filed in this case calls into question the constitutionality of an Oklahoma statute and a provision of the Oklahoma Constitution (Petition for Writ of Certiorari, 4-5 and throughout).

2. Petitioners, in accordance with the provisions of 28 U.S.C. § 2403(b) and Sup. Ct. R. 29, have certified the fact of these constitutional challenges to the Attorney General of Oklahoma (Petition for Writ of Certiorari, 4-5).

3. Neither the State, nor any agency, officer, or employee was a party in the case below (Id.).

4. Under the provisions of 28 U.S.C. § 2403(b), a State, in a case such as this, can intervene to present evidence, if evidence is otherwise admissible, and to present argument on the question of constitutionality.

5. Under the authority of 28 U.S.C. § 2403(b), the State of Oklahoma desires to be heard on the constitutionality of the challenged Oklahoma laws, and wishes to file the accompanying Brief in Opposition to the Petition for Writ of Certiorari.

For the reasons stated above, the State of Oklahoma respectfully requests that this Court grant it leave to intervene as a party respondent and, at

this stage in the proceedings, file the accompanying Brief in Opposition to the Petition for Writ of Certiorari.

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Attorney General of Oklahoma

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BRIEF IN OPPOSITION OF INTERVENOR, THE STATE OF OKLAHOMA,

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THE STATE OF OKLAHOMA

REASONS FOR DENYING THE WRIT

Introduction

The question presented in the Petition for Certiorari was one which the court below did not consider raised. Thus, it was not considered on the merits. If raised below, as claimed, it was raised at the eleventh hour in a final brief. No opportunity was afforded to respond: no

opportunity to develop a record on the issue was given.

In short, the question presented was not properly joined below, was not addressed by the parties, and thus was not adequately developed below. The record below is consequently a poor one on which to consider the issue tendered in the Petition.

Petitioners have been unable to cite even one case in which the question presented was discussed, or even raised. Thus, there is little reason to believe that the courts of the nation need this Court's guidance on the issue.

The Petitioners' unique theory of the First Amendment, which is the basis for the question presented, is not discussed or considered in any case known or presented. Their unique First Amendment theory is also flawed.

There is no need to address the question presented.

Nature of the Case Below

Under Oklahoma law, the people's right of initiative is limited. For example, to avoid log rolling, laws proposed by the initiative process are limited to one subject.[1] Also, laws proposed may not be repugnant to the United States

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[1] Okla. Const. Art. XXIV, § 1. That section in pertinent part provides:

> No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted; . . .

[Emphasis added.]

This limitation not only applies to constitutional amendments proposed by the Legislature, but also applies to amendments proposed by initiative petition. E.g., In re Initiative Petition No. 342, State Question No. 628, 797 P.2d 331 (Okla. 1990).

Constitution.[2] Initiative measures, prior to being placed on the ballot, are subject to challenge as being outside of these limits;[3] successfully challenged measures are not placed on the ballot.[4] In proceedings challenging either the sufficiency of the number of signatures supporting an initiative petition, or the legal sufficiency of the petition, the ultimate determination made is whether the proposed measure will appear on the ballot and be presented for a vote of the people.[5]

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[2]Okla. Const. Art. II, § 1 (set out in full in Petition for Certiorari at p. 2), and In Re Initiative Petition 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (the decision below) (Petitioners' App. 12a).

[3]Okla. Stat. tit. 34, § 8 (1991) (set out in full at Petition for Certiorari, pp. 3-4).

[4] E.g., In re Initiative Petition No. 342, State Question No. 628, 797 P.2d 331 (Okla. 1990).

[5]Ballot titles for the proposed measure may also be challenged, but the issue in such proceedings is not whether

Petitioners' initiative proposal was found to be outside Oklahoma's limited initiative power because it was repugnant to the United States Constitution, and accordingly it was not placed on the ballot.

Proceedings Below

The challenges to Petitioners' initiative petition took three forms: (1) challenges to the sufficiency of the signatures supporting it; (2) challenges to the ballot title; and (3) challenges to the legal sufficiency of the petition--including a challenge based on the measure being outside of the people's limited initiative power because the proposed measure was "repugnant to the United States

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the matter will be on the ballot. Rather, the issue in such cases is whether the proposed title is appropriate, if the measure were placed on the ballot. If not appropriate, the Supreme Court rewrites the ballot title. Okla. Stat. tit. 34, § 10 (1991).

Constitution." In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (Petitioners' App., 3a-4a.).

While these challenges presented multiple issues, the Oklahoma Supreme Court found a single issue to be dispositive of the entire case: whether the proposed law was repugnant to the United States Constitution, and therefore outside of the limited initiative powers reserved to the citizens of Oklahoma? In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug.4, 1992). (Petitioners' App. at 2a-4 and 12a.)

In finding the proposed measure repugnant to the United States Constitution, the Court read the Petitioners' final brief to concede that their initiative proposal was unconstitutional when it was drafted, unconstitutional when it was circulated, and unconstitutional at the time of their

briefing. Id. Because the Court found that the proposal was outside the people's initiative power, the measure was not placed on the ballot and not submitted to the people for a vote.

Petitioners' Unique Position

Petitioners assert that the Oklahoma Supreme Court's determination that the matter they submitted by initiative petition was repugnant to the United States Constitution and therefore was outside the limited initiative power of the citizens of Oklahoma and thus would not be submitted to a vote of the people, deprived Petitioners of their "free speech" right to advocate passage of the initiative measure "from certification through voting." (Emphasis added.) (Petition for Certiorari, 9-11). In taking this position, Petitioners present a unique question, based upon a unique theory of the law. A question so

unique, Petitioners have been unable to demonstrate that it has been raised in or considered by any court.

Faulty Premise Upon Which Petitioners' Position is Based

The argument that First Amendment "free speech rights" guarantee Petitioners the right to advocate passage of the proposed measure from "certification through voting" assumes that: 1) the measure in question is going to be voted upon, and 2) there is and will be a period that ends with a vote on the measure. These assumptions wholly ignore the fact that there will be no vote on the proposed measure because the measure was found outside the scope of the people's initiative power.

A finding that a measure proposed by initiative is outside the peoples' initiative power simply does not violate the free speech rights of those proposing the measure. For example, assume that a

state confers upon its citizens the right of initiative to amend the Constitution, but does not confer that right to amend statutes. In that state, initiatives seeking to amend statutes would be outside the scope of the peoples' power, and thus should not be placed on the ballot.

Similarly, under Oklahoma law, petitions can be found insufficient because they are outside the scope of the people's power, and thus not eligible of being presented for a vote.

Proponents' unique position apparently is that when a state creates an initiative petition process, no matter how limited, any petition--whether within or outside the limits of the initiative power--must proceed to a vote of the people. The Petitioners offer no case holding or even supporting their unique view of the First Amendment. Petitioners' reliance on Meyer

v. Grant, 486 U.S. 414 (1988), is particularly misplaced.

Petitioners' Reliance on Meyer v. Grant, To Support Their Unique View of the First Amendment, is Particularly Misplaced

Meyer v. Grant, struck down a Colorado law which prohibited proponents of an initiative petition from circulating it through the use of paid circulators. In the case below, the manner in which a petition can be circulated was not an issue.

In the case below, the dispositive issue was whether the initiative measure being proposed was within the scope of the people's limited initiative powers. Meyer made no holding on this issue and, in fact, did not even discuss it.

The question in Meyer dealt with the limits Colorado put upon the means to exercise the state-conferred right of initiative. The issue in the case below

was wholly different, it dealt with whether the proposed initiative measure was within the powers reserved to the people, and not with the means that could be used in exercising that power.

The Oklahoma law being challenged does not limit speech. Proponents of an initiative petition may advocate it through paid circulators, television, billboard, or any means they so desire.

The flaw in Petitioners' theory is even more apparent when their theory is applied in a slightly different context. Assume that a state requires candidates for Governor to be at least 30 years of age. A ruling that the State could not prohibit a candidate from paying circulators to obtain sufficient signatures to become a candidate, would not be a ruling that the candidate was qualified. Under Petitioners' unique First Amendment theory, a candidate who was unqualified because he

was only 25, would have to be placed on the ballot, so those who desired could support and vote for the unqualified candidate. Such an analysis, of course, does not track.

The issue of which means can be used to support an initiative proposal or a candidate is wholly separate from the issue of whether the candidate or initiative proposal is qualified to appear on the ballot. Petitioners seek to magically connect these matters--matters which are not logically connected. Thus, it is not surprising that the Petitioners have presented no case supporting their unique theory. In point of fact, the case below did not address the merits of the issue, though it was mentioned in passing.

Issue Presented in Petition For Certiorari Was Not Raised Below

The Oklahoma Supreme Court, in reviewing Petitioners' brief below, did not consider Petitioners to have raised a First Amendment claim:

> We understand the proponent's characterization of their petition as "core political speech" as additional emphasis for the importance of the initiative process and for placing the proposition on the November ballot--and not as an attempt to raise a First Amendment claim.

In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992). (Petitioners' App., 12a).

Rather the Court viewed Petitioners' "political speech" characterization as an attempt to balance their desire to have the proposal placed on the November ballot against the desire of other Oklahomans, as expressed in the Constitution, to limit the initiative power:

> It [Petitioners' argument] is, in effect, an argument that their "free speech" rights to advocate an unconstitutional law outweigh constitu-tional rights of all other Oklahomans that the Oklahoma Constitution should not be repugnant to the [United States] Constitution. . .

In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992). (Petitioners' App., 12a-13a).

Because the Oklahoma Supreme Court did not understand Petitioners' arguments to raise a free speech claim, the Court did not address the matter--though it was mentioned.

The Court considered the issue below to be: which of two alternatives was appropriate, that is, whether pre-submission or post-submission examination of the initiative proposal's compliance with the initiatives' limits was appropriate. The Court, following a long

line of Oklahoma cases,[6] held that addressing the "eligibility" of the initiative proposal prior to submission to the people was proper, because pre-submission review, avoids costly elections and avoids "misleading citizens about the legal effect of the proposition."[7]

Even if the decision of the Oklahoma Supreme Court could somehow be construed to have addressed the merits of the issue Petitioners raise here, the manner in which the issue was "raised," at the eleventh hour, with the resulting lack of an

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[6] In re Initiative Petition No. 348, 820 P.2d 772, 780 (Okla. 1991); In re Initiative Petition No. 347, 813 P.2d 1019, 1030 (Okla. 1991); In re Initiative Petition No. 341, 796 P.2d 267, 269 (Okla. 1990); In re Initiative Petition No. 315, 649 P.2d 545, 547-48 (Okla. 1982). In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma, 534 P.2d 3, 8 (Okla. 1975).

[7] In re: Initiative Petition No. 349, State Question No. 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (Petitioner's App., 9a-16a).

opportunity to respond or build a record on the issue, makes this case a poor case in which to examine the issue presented.

This Case Presents a Poor Vehicle to Examine the Issue Presented Because:

(1) If raised at all, the issue was raised in a last-minute brief;

(2) No Opportunity to respond was given;

(3) No opportunity to develop a record on the issue was given;

(4) No record on the issue was developed;

(5) The court below did not address the merits on the issue.

As noted above, the First Amendment issue which Petitioners present was not one which the Supreme Court of Oklahoma thought was raised below. In its July 14, 1992, Briefing Order, the Oklahoma Supreme Court asked for simultaneous briefs from the parties, and from the Attorney General, addressing Planned Parenthood v. Casey, _ U.S. ___, 112 S.Ct. 2791 (1992) and "its impact on the constitutionality of the

proposed ballot title and the substance of the Initiative Petition." (Supreme Court's Briefing Order, Petitioners' App., 88a-89a).

In response to this simultaneous briefing schedule, the Petitioners filed a brief which the Supreme Court read as conceding the unconstitutionality of their initiative petition:

> As we read the proponent's submission, they conceded that the initiative petition was unconstitutional when it was drafted, that it was unconstitutional when it was circulated, and that it is unconstitutional now. However, the proponents insist that we should allow the petition to go forward as an exercise in political advocacy.

In re Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (Petitioners' App., 4a.)

This "political advocacy" prayer was "raised" for the first time, at the eleventh hour, in response to the

simultaneous briefing schedule on another issue. If Petitioners, in praying that the matter be placed on the ballot as an exercise of "political advocacy", intended to challenge the constitutionality of Oklahoma's Constitution and statutes, Petitioners did not make that clear.

Further, the State, who was not a party to the proceeding, was not notified of any challenge. Neither the parties, nor the State, was allowed to respond. No record was made on the issue, nor was the State permitted to present evidence or argument on the issue. Accordingly, even if the question presented cried out for this Court's immediate attention--which it does not--this case would present a poor vehicle for such consideration.

The question presented in the Petition is not one which was properly joined below, not one which the parties addressed below, and thus was not adequately developed

below. The record below, is thus a poor one on which to consider the issue tendered by Petitioners.

Even if the record below adequately developed and addressed the tendered issue, there is no immediate or pressing need to address it.

There is No Immediate or Pressing Need to Address the Issue Tendered by Petitioners

As mentioned above, Petitioners have been unable to find even one case addressing their unique view of the First Amendment. They have been unable to cite even one case in which it was raised or discussed. It thus appears that the courts of our nation are not in immediate need of this Court's guidance on the issue.

The question presented is a product of Petitioners' apparently unique free speech analysis--an analysis which fails to recognize the distinction between laws

which limit and restrict the means citizens may use in exercising a state-conferred power, and laws which define the scope of the state-conferred power. It may well be that the courts of the nation will never need guidance on the issue. At any rate, there is certainly no immediate need for this Court's guidance, and thus, this Court's limited resources are best spent addressing other issues--not the issue presented in the Petition.

CONCLUSION

The Petition For Writ of Certiorari Should Be Denied.

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November, 1992